

No. 86-1059

Supreme Court, U.S.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MILDRED BAILEY BELL, PETITIONER

v.

JOHN THOMAS BELL, JR.

PETITIONER'S REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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This case is now before the Court on
Petition for Writ of Certiorari to review
a judgment entered by the Fifth Circuit
Court of Appeals affirming a district court
Order denying sanctions under the Federal
Rules, under 28 U.S.C. § 1927, and under
a local rule. The Fifth Circuit rejected
Petitioner's contention that since the

record shows on its face that violations occurred the district court erred as a matter of law by refusing to impose sanctions.

SUMMARY OF REPLY

It is noteworthy that in opposing this Petition for Certiorari Respondent has not cited a single case in support of the Fifth Circuit's rulings. Nor has he advanced a single argument on the law as to why the split in the circuits created by the decision below should not be resolved, and resolved immediately, by a pronouncement from this Court (1) that the Federal Rules of Civil Procedure mean exactly what they say--sanctions shall be imposed when the Rules are violated; and (2) that federal appellate courts may not deprive litigants of their right to appellate review by affirming lower court rulings on contentions which have not been considered on the merits.

Respondent argues that the Fifth Circuit's decision was based upon a misconstruction of the district court's Order. Petitioner submits that the decision was based upon the Fifth Circuit's interpretation of the Federal Rules. As the Fifth Circuit interprets those Rules, the Rules do not mandate that sanctions be imposed even if violations did occur.

Respondent argues further that any decision rendered by this Court in the present case would have only limited applicability because "enterprising counsel" in "normal" federal litigation would be able to distinguish their cases on the facts. This argument will not bear close scrutiny. The Federal Rules do not require responsible, ethical conduct in only some kinds of cases; they prohibit irresponsible conduct in all kinds of cases. The Rules are not concerned with the subject matter of law suits; they speak to the conduct of par-

ties and their attorneys during the course of any kind of case.

Respondent also argues that the conduct he engaged in is not the kind of conduct the Federal Rules seek to deter. That argument is untenable. The Rules themselves specify as prohibited conduct such things as misrepresentations of fact or law and the filing of frivolous defenses and arguments. Respondent did all of those things, and more, in the proceedings below, but he appears to view such conduct as acceptable.

The reasonable inquiry and good faith obligations imposed upon litigants and their attorneys in federal court cannot be bent or modified to accommodate personal opinions of what is or is not acceptable. The Rules set out the standard, and the standard is an objective one.

Those whose personal code of ethics permits them to file "standard boiler-plate" defenses and arguments with the court, to

deliberately misrepresent the facts and law to the court, and to refuse to admit relevant facts that they know to be true have a duty to familiarize themselves with the standard of conduct required by law and to adhere to that standard when litigating in federal court.

I.

RESPONDENT'S CONTENTION THAT CERTIORARI SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT MISCONSTRUED THE DISTRICT COURT'S ORDER IGNORES THE DETRIMENTAL IMPACT THE FIFTH CIRCUIT'S RULING WILL HAVE UPON THE EFFECTIVENESS OF THE FEDERAL RULES IN CURBING ABUSES OF THE JUDICIAL PROCESS IF THIS COURT DECLINES TO REVIEW THAT RULING.

In response to this Court's direction to file a Response to Petitioner's Petition for Certiorari, Respondent argues that the petition should be denied because, inter alia:

[T]he Court of Appeals misconstrued what the district court found The district court did not find that there were any violations of the rules. If violations had been found, the district court would have im-

posed sanctions. [Response,
p. 16].¹

By assuming that the district court would have imposed sanctions if violations had been found, Respondent appears to be tacitly acknowledging that sanctions would have been mandatory if violations had occurred, and he appears to be arguing that he did not in fact violate the Rules.

Furthermore, the general tenor of Respondent's argument suggests that if the Fifth Circuit's decision was in fact based upon a misconstruction of unarticulated words in the district court's order--as he

¹Respondent appears to be challenging what he perceives to be the Fifth Circuit's misconstruction of the district court's Order. This is, to say the least, somewhat anomalous. Respondent argues that we must assume that the district court found that no violations occurred, because if the district court had found otherwise it obviously would have imposed sanctions. (In other words, we must not impute error to the court.) And yet, he--who did not file a cross-petition for certiorari in this case--argues that the appellate court's judgment affirming the district court's decision was based upon an error made by the appellate court in "construing" the district court's Order.

perceives it to be--the appellate decision is of no importance. Thus, he argues that this Court's first inquiry must be into whether the Record reveals obvious rule violations which the district court ignored, and that if this is answered in the affirmative the Court "must conduct an examination of the conduct complained of for the purpose of determining if sanctions should or should not be imposed." [Response, pp. 17-18]. Such a procedure, he argues, would be so cumbersome that it should not be undertaken by this Court. [Id.].

Respondent's argument overlooks the fact that it is the Fifth Circuit's judgment that is the subject matter of this petition. The threshold question is whether that judgment raises issues of sufficient importance to warrant review by this Court. If the Court undertakes review, the next question will be whether the specific rulings upon which the Fifth Cir-

cuit's judgment of affirmance was based comply with the relevant Rules and statutes.

This Court's decision with respect to granting the petition for certiorari should not be based upon speculation about what unarticulated findings underlay the district court's Order denying sanctions; it must be based upon a determination of whether the Fifth Circuit's judgment, which creates a split in the Circuits and establishes precedents for its lower courts to follow, should be reviewed by this Court because of the importance of the issues it raises. Those issues are discussed in some detail in the Petition, pages 16-33. [See esp. pp. 23-30].

II.

THE RESPONSE FILED ON RESPONDENT'S BEHALF IN THIS COURT WAS ITSELF IMPROPERLY CERTIFIED AS BEING WELL GROUNDED IN FACT.

It is noteworthy that even at this stage of the proceedings Respondent is either unaware of the certification re-

quirements, does not understand them, or refuses to be bound by them. Respondent has misrepresented the Record to this Court in at least three ways:

(1) On page 6 of his Response, Respondent makes the following statement:

Among the instances complained of [by Petitioner in the courts below], the Court upon receipt of the record, will find the following allegations[.]

Respondent then goes on to set out six numbered statements--single-spaced and indented, as if they are direct quotations of statements or arguments made by Petitioner. [See Response, pp. 6-7 and S. Ct. Rule 33(c)]. In fact, the statements are not quotations from the Record, and they bear little or no resemblance to the allegations actually made by Petitioner in the courts below. Nevertheless, later in his response Respondent refers the Court to those statements as support for the following :

The Respondent respectfully suggests that the conduct at issue does not amount to the unreasonable kinds of conduct that Rule 11 seeks to deter. [Response, p.20].

The statements that Respondent falsely presents as direct quotations from the Record are in fact absurd, and Petitioner submits that they were presented in that fashion in order to mislead this Court into believing that the allegations of misconduct were petty, trivial, and without merit.

(2) With respect to the discovery responses filed on Respondent's behalf in the district court, Respondent asserts to this Court:

Petitioner had filed an enforcement and contempt proceeding in the Georgia courts prior to commencing the federal action, and those Georgia proceedings had been terminated prior to the institution of the federal court action. Discovery in the prior Georgia proceeding caused some of the discovery difficulty in [sic] which the Petitioner complains in

the instant appeal. [Response, pp. 12-13].

The statement that Petitioner had filed an enforcement and contempt proceeding in the Georgia courts prior to filing her federal court domestication suit is false. Indeed, Respondent himself gave the only testimony in the record concerning the Georgia proceedings, and he testified at the evidentiary hearing that in 1983 he filed suit in Georgia in an attempt to have the parties' incorporated agreement modified. [Reporter's Transcript, pp. 49-50].

Since the Georgia lawsuit was irrelevant in the proceedings below, and certainly is highly irrelevant in this Court, one can only speculate as to why Respondent wanted this Court to believe that Petitioner was the Plaintiff in the 1983 Georgia litigation. But whatever his motive, the statement is false.

(3) While attempting to persuade this

Court that Respondent's attorney did not unreasonably and vexatiously multiply and proliferate the proceedings, Respondent states that

[Included] as part of the Appendix hereto is a copy of the docket sheet which was certified as part of the record from the district court, showing all the filings in this case. [Response, p. 10].

While the docket sheet probably should show all filings, the docket sheet in this case does not do so, and this fact is well known to both parties.

More than 60 documents were actually filed in the district court, but many of those documents were not entered on the docket sheet, apparently because they were filed with the judge and not sent to the clerk's office.²

²The record as originally certified to the Fifth Circuit contained 147 pages; in response to Petitioner's repeated motions to have the entire record sent up, three supplemental volumes (consisting of 247, 23, and 7 pages, respectively) were

In the "Record Excerpts" filed in the Fifth Circuit, Petitioner provided that court and Respondent himself with a chronological list of all papers filed in the district court and where they can be found in the record, along with photocopies of both the docket sheet and the cover sheets of the Supplemental Records (which listed the documents contained therein and the dates filed or served). Despite this, Respondent presented the docket sheet alone to this Court, stating that it showed "all filings in the case." And he did so in support of his contention that he had not proliferated the proceedings below.

III.

RESPONDENT'S ARGUMENT THAT CERTIORARI SHOULD BE DENIED IN THIS CASE BECAUSE "ENTERPRISING

ultimately certified as part of the record on appeal. A few of those pages represented post-judgment motions and orders; a few represented papers which had been properly entered on the docket sheet but not sent up with the original record, but most represented documents filed throughout the proceedings which had not been entered on the docket.

COUNSEL WILL BE ABLE TO FACTUALLY DISTINGUISH THIS CASE FROM THEIR OWN MORE 'NORMAL' KINDS OF FEDERAL LITIGATION" IS WITHOUT MERIT; THE REQUIREMENTS OF THE FEDERAL RULES OF CIVIL PROCEDURE DO NOT VARY FROM CASE TO CASE MERELY BECAUSE CASES ARE FACTUALLY DISTINGUISHABLE.

Respondent may be correct in his assertion that if this Court rules upon the issues raised by the Fifth Circuit's decision in this case "enterprising counsel will be able to factually distinguish this case from their own more 'normal' kinds of federal litigation." [Response, pp. 13-14]. However, if Respondent is suggesting that such distinctions could be used to avoid a decision by this Court with respect to the obligations imposed upon litigants and their attorneys by the Federal Rules, then Petitioner submits that he is incorrect.

If an appropriate sanction is mandated by the Rules when the Rules have been violated, as other Circuits consistently have held, then an appropriate sanction is man-

dated in any case in which violations occur. The language of the Rules at issue in this case cannot properly be said to have one meaning in some circumstances, another meaning in others. The Rules govern the manner in which litigation is conducted, and their requirement that litigation be conducted in a responsible manner is unrelated to both the nature of the claim and the dollar amount involved.

CONCLUSION

The protections afforded federal court litigants by the Federal Rules of Civil Procedure should be available to all litigants--in every district in every Circuit--in cases where the amounts involved are small as well as in those where the amounts are large.

Petitioner respectfully submits that it may reasonably be assumed that egregious abuse of the legal process is most likely to occur, and most likely to go unpunished,

in cases where the monetary stakes are small and appeal is unlikely because of the high additional costs involved. If that is a reasonable assumption, then it would seem to follow that the most abusive cases will seldom reach this Court. While it is true that all litigants have the right to proceed pro se in order to minimize the financial burden, as a practical matter most litigants cannot do so.

Petitioner respectfully submits that the Record in this case provides an incredible, irrefutable example of the abusive tactics being employed by some litigants and their attorneys--tactics which clearly are proscribed by the Federal Rules.

For the reasons set forth above and in the Petition itself, Petitioner urges the Court to grant the Petition and summarily reverse the Fifth Circuit's decision, thereby establishing beyond dispute that the plain language of the Federal Rules is

the law of the land with respect to the obligations imposed upon litigants and their attorneys in federal litigation, and with respect to the duty of the lower courts to see that those obligations are met.

Respectfully submitted,

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